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Supreme Court of the United States

October Term, 1979

No. 79-1239

SIDNEY A. SPARKS AND R. L. LYND,
d/b/a SIDNEY A. SPARKS, TRUSTEE
Petitioners

v.

DUVAL COUNTY RANCH COMPANY, INC.,
CLINTON MANGES, ORVILLE DENNIS,
CLARENCE MARTENS, AND O. P. CARRILLO
Respondents

BRIEF OF RESPONDENT ORVILLE DENNIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents

BRIEF OF RESPONDENT ORVILLE DENNIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Orville Dennis prays that the Petition of Sidney A. Sparks and R. L. Lynd d/b/a Sidney A. Sparks, Trustee, for Writ of Certiorari be refused. In support of that prayer, Respondent would respectfully show the folowing:

RESPONSE TO PETITIONERS' STATEMENT OF JURISDICTION

In their statement of jurisdiction, at page 2 of their Petition for Writ of Certiorari, Petitioners refer to a "timely motion for rehearing". The Court is advised that the only motion for rehearing filed with the Court of Appeals was filed by this Respondent. The "motion" was entitled "Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee, Orville E. Dennis". A true copy of the Court of Appeals' order denying this Respondent's Petition for Rehearing appears in the Appendix at page A1.

No motion or petition for rehearing was filed by the Petitioners as appellants in the Court of Appeals. The petition for rehearing filed by this Respondent did not question the Court of Appeals' holding which is the subject of Petitioners' Petition for Writ of Certiorari—that the state court judge is immune. Respondent questioned the other holding which concerns this Respondent—that Petitioners can maintain their claim for damages against this Respondent.

It is submitted that the statutory 90 days for filing a petition for writ of certiorari began to run for the Petitioners at least upon the entry by the Court of Appeals of the judgment on rehearing en banc on October 22, 1979. It is submitted that Respondent's petition for rehearing did not extend the filing time for Petitioners. To have been timely filed, Petitioners' Petition for Writ of Certiorari should have been filed with the Clerk of this Supreme Court on or before January 21, 1980. However, Petitioners' Petition was not filed with the Clerk of the Court until the following February 1, 1980. Moreover, no motion for extension of time was filed by Petitioners on or before January 21, 1980. It is, therefore, submitted that this Supreme Court does not have jurisdiction to consider Petitioners' Petition for Writ of Certiorari.

Subject to this Respondent's stated position that Petitioners' Petition was filed late, without waiving that position, Respondent would reply to other portions of Petitioners' Petition in the event this Court should disagree with Respondent's position on the untimeliness of the Petition for Writ of Certiorari.

RESPONSE TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Respondent submits that the first "question" stated by Petitioners at page 2 of their Petition is irrelevant to the subject case. The state court judge, O. P. Carrillo, one of the Respondents herein, was never adjudged disqualified to hear the state court lawsuit upon which is premised Petitioners' complaint under Title 42, United States Code, Section 1983. Petitioners' asserted number one question presented is simply not supported by the facts of the case, as will be demonstrated by Respondent in the remainder of this Brief.

Similarly, Petitioners' asserted number two question presented is not supported by the facts of the case. There has been no showing that the subject state court judge, O. P. Carrillo, entered the questioned temporary injunction in exchange for any "bribe". However, Petitioners did plead in their "Plaintiffs' First Amended Complaint" that Respondent O. P. Carrillo did receive over a period of years certain favors from Respondent Clinton Manges.

The relevant portion of the amended complaint appears in the Petition for Writ of Certiorari at pages 50a-51a.

Respondent suggests that the one question of law presented by the Petition for Writ of Certiorari is more accurately stated, as follows:

> "Whether the Court of Appeals was correct in hold- that O. P. Carrillo, a state court judge, was immune from Petitioners' claim for damages under Title 42, United States Code, Section 1983, under the doctrine of judicial immunity."

RESPONSE TO PETITIONERS' STATEMENT OF STATUTES INVOLVED

Petitioners assert at page 3 of their Petition that five state and federal constitutional and statutory provisions are involved in the Petition for Writ of Certiorari. To the contrary, only one of those provisions is involved, that being Title 42, United States Code, Section 1983 [Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13], which reads as follows:

> "Sec. 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In addition to the above-quoted federal statute, which will be referred to in the remainder of this brief as "Section 1983", Petitioners also propose that four constitutional provisions are involved, one from the United States Constitution and three from the Texas Constitution. First of all, Article 2, Section 4 of the United States Constitution is simply inapplicable to Texas and Texas state court judges. That provision, quoted at page 44a of the Petition, relates to removal from office of the president, vice-president and civil officers of the United States upon impeachment and conviction for treason, bribery, or other high crimes and misdemeanors.

With respect to the three provisions of the Texas Constitution cited by Petitioners, Article 16, Section 41, quoted in the Petition at pages 43a-44a, relates to the criminal offense of bribery committed by citizens and by members of the state legislature, state executives, and state judicial officers. That provision has nothing to do with disqualification of a judge to sit in a particular case, nor with a judge's liability for a civil suit for damages brought by a citizen of Texas.

Article 15, Section 6, of the Texas Constitution quoted in the Petition at pages 44a-45a, is the constitutional provision relating to removal of district court judges by the Supreme Court of Texas. It has nothing to do with the disqualification of a judge to sit in a particular case, nor with the liability of a judge for civil damages.

The third Texas constitutional provision, Article 5, Section 11, quoted in the Petition at pages 45a-46a, does set out the exclusive grounds for the disqualification of state district court judges, as well as members of other stated Texas courts. However, it has no relevance to a judge's liability for civil damages. That state constitutional provision was not asserted by the Petitioners in the subject

state court trial. This state law provision was first asserted by the Petitioners in their complaint filed in the instant case in federal district court seeking damages under Section 1983.

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

Petitioners misstate the subject case in their "Statement of the Case", which begins at page 3 of their Petition. They begin their "Statement" by describing another state court lawsuit. They finally make reference to the case before this Court (assuming existence of jurisdiction) in the second portion of their "Statement" at page 4 of their Petition.

In response, Respondent submits the following statement of the case. In the District Court below, the Petitioners alleged that a Texas state district court judge, O. P. Carrillo, a respondent herein, conspired with certain private individuals, Duval County Ranch Company, Clinton Manges, Clarence Martens and this Respondent, Orville E. Dennis, to deprive Petitioners of their civil rights. The complaint for damages was brought under Title 42, United States Code, Section 1983.

In the Petitioners' amended complaint, which appears in the Petition for Writ of Certiorari at page 47a, the alleged conspiracy is described as involving the conduct of Duval County Ranch Company in suing the Petitioners in state district court to wrongfully enjoin the Petitioners from certain activity on an oil and gas lease, the judge's subsequent entry of a temporary injunction, and Martens' and this Respondent's signing as individual sureties on the bond required under state law for issuance of the

temporary injunction. The temporary injunction was dissolved on appeal to a Texas appellate court. *Winslow v. Duval County Ranch Company*, 519 S.W.2d 217 (Tex. Civ. App. 1979—Beaumont, writ ref'd n.r.e.).

There was no motion made by the Petitioners in the state trial court raising the issue of the disqualification of the state judge to hear the case or enter the temporary injunction. There was no such determination by the Texas appellate court.

The only allegations contained in the Amended Complaint as to this Respondent are the conclusory allegations that this Respondent "knew" about a conspiracy among the judge, Manges and Duval County Ranch Company to unlawfully injure the Petitioners, and that this Respondent had participated in that conspiracy by signing a temporary injunction bond as individual surety.

The District Court below, on motions to dismiss submitted by this Respondent and the other defendants below, dismissed the amended complaint against all defendants. The District Court in its memorandum order premised the dismissal upon the state court judge's immunity from suit under Section 1983 (Memorandum Order appears in the Petition for Writ at page 39a).

The District Court found that the state judge's action of entering the injunction was a judicial act within his authority and jurisdiction. The District Court reasoned that, but for the entry of the injunction by the state judge, the Petitioners would not have suffered the alleged injury.

Assuming the allegations of a conspiracy in the amended complaint to be true for purposes of the hearing on motions to dismiss, the District Court below found that

the state judge participated in the alleged conspiracy in his role as judge. His action in the conspiracy, that is, entering the injunction, was a judicial act within his authority and jurisdiction. Thus, the District Court held, the state judge is immune from liability under Section 1983.

As to the complaint against this Respondent and the other private alleged co-conspirators, the District Court held that a valid claim could not be stated against them under Section 1983. Because of the judge's immunity from suit, the other defendants had not conspired with a state officer against whom a valid claim could be stated under Section 1983.

By per curiam opinion dated January 17, 1979, a three judge panel of the Court of Appeals for the Fifth Circuit, the Honorable Judges Wisdom, Godbold and Tjoflat, affirmed the trial court's dismissal of the complaint against both the state court judge and the private citizen defendants, including this Respondent. In that opinion, the Court of Appeals affirmed the dismissal of the complaint under the doctrine of judicial immunity as applied to Section 1983 cases (Opinion appears in the Petition at page 33a).

With respect to the private citizen defendants, including this Respondent, the Court below held that the private citizens, in allegedly conspiring with a state judge, did not conspire with a person against whom a claim valid under Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under that statute.

No petition for rehearing was filed nor was any motion to stay issuance of the mandate filed. Then, on March

9, 1979, notice was given by the clerk of the Court of Appeals of the entry of an order by a then majority of judges in active service, on the Court's own motion, to rehear the cause by the Court en banc with oral argument. Through its clerk, the appeals court below notified Respondent and the other parties of its intent to reconsider en banc only the holding of the panel affirming the dismissal of the complaint as to the private alleged co-conspirators. The clerk's notice referred specifically to a footnote, number 13, in a recent opinion of this Court, *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct. 1099 (1978).

The cause was submitted on rehearing to the Court of Appeals en banc on June 5, 1979. By opinion dated October 22, 1979, by a ten to four decision, the Court of Appeals affirmed the panel's holding that the state court judge was immune from suit, but reversed as to the private alleged co-conspirators. The Opinion on rehearing en banc appears in the Petition at page 2a.

The majority in the en banc opinion on rehearing reasoned that, even though the state court judge is immune from suit under Section 1983, his participation in the alleged conspiracy, that is, his granting the temporary injunction, still gave the alleged conspiracy the requisite state action.

Since the conspiracy had the requisite state action, a claim could be maintained under Section 1983 against the private citizen alleged co-conspirators.

This Respondent filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 5, 1979, which was overruled by order of the Court of Appeals entered on December 14, 1979. Upon this Respondent's

motion for stay of issuance of mandate, the Court of Appeals stayed the mandate until February 1, 1980.

On February 1, 1980, this Respondent filed his Petition for Writ of Certiorari which has been docketed by the Clerk of this Supreme Court as No. 79-1186, styled "Orville E. Dennis, Petitioner vs. Sidney Sparks and R. L. Lynd, d/b/a Sidney Sparks, Trustee, Respondents". In that Petition for Writ of Certiorari, this Respondent as Petitioner asserts that the decision of the Court of Appeals that allows the Petitioners in this case to maintain their complaint brought under Section 1983 against this Respondent, a private individual, is contrary to the public interest sought to be protected by the doctrine of judicial immunity as applied by this Supreme Court in Section 1983 cases. Further, this Respondent asserts in that Petition for Writ that the decision of the Court of Appeals allowing the Petitioners herein to maintain their suit under Section 1983 against this Respondent, as a private citizen co-conspirator, conflicts with the established rule followed by a majority of the courts of appeals, that this Supreme Court has not ruled on the specific issue, and that the conflict needs to be resolved by this Court because of the effect on the public policy behind the doctrine of judicial immunity.

In the first portion of their "Statement of the Case" Petitioners are referring to another state court lawsuit altogether removed from the state court lawsuit which is the basis for the case before this Court. That lawsuit was stayled "Clinton Manges, Plaintiff vs. M. A. Guerra, et al, Defendants", No. 3953, 229th Judicial District Court, Starr County, Texas. That case did not involve any of the Petitioners in this case, as conceded by Petitioners at page 4 of their Petition. It did involve one of the Respondents in this case, Clinton Manges. It involved different facts and different issues.

REASONS FOR REFUSING TO GRANT THE WRIT

Respondent submits that review on Writ of Certiorari should not be granted. The reasons for refusing to grant the Writ are many and they may be summarized as follows:

1. The Court of Appeals' decision to uphold and effectuate the doctrine of judicial immunity is consistent with the holdings of the United States Supreme Court and numerous Circuit Courts of Appeals.

2. It is a well established legal principle that the doctrine of judicial immunity applies even when a judge is accused of being corrupt or malicious.

3. It is uncontroverted that the judge in the present case acted within his state court jurisdiction.

4. There is no support in the record for Petitioners' argument that the state court judge was disqualified in the subject state court case. The argument is premised in state law and based upon another lawsuit unrelated to the subject lawsuit—another lawsuit involving other parties, issues and subject matter. Moreover, the argument runs contrary to well-settled Texas law.

5. Petitioners fail to correlate how any alleged bribery affected the state court judge's decision in the present case.

6. The Petition for Writ of Certiorari should be stricken for the reason that Petitioners filed their Petition too late.

ARGUMENT AND AUTHORITIES

I.

THE COURT OF APPEALS' DECISION TO UPHOLD AND EFFECTUATE THE DOCTRINE OF JUDICIAL IMMUNITY IS CONSISTENT WITH THE HOLDINGS OF THE UNITED STATES SUPREME COURT AND NUMEROUS CIRCUIT COURTS OF APPEALS.

The Fifth Circuit Court of Appeals' decision, in regard to its recognition of judicial immunity, is consistent with the decisions of the United States Supreme Court and numerous circuit courts of appeals decisions. The basic rule which has been followed is that judges are absolutely immune to civil damage suits for judicial acts done within their jurisdiction.

It was long ago recognized by this Court that it was in the public interest to protect judges from lawsuits brought complaining of their judicial decisions. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872). This landmark decision emphasized that the concept of judicial immunity is important to preserve our system of jurisprudence and it is imperative that judges be immune from prosecution for their acts as judges. This Court emphasized in *Bradley v. Fisher, supra,* that the doctrine of judicial immunity is based upon sound public policy:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to

> himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. . . .
>
> "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry . . ." *Bradley v. Fisher,* 80 U.S. at 347, 20 L.Ed. at 649-650.

Quoting from the case of *Floyd and Barker,* reported by Coke in 1608 (12 Coke 25), this Court in *Bradley* noted that if judges were subject to being questioned for their motives in their decisions as judges, such would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." *Bradley,* 80 U.S. at 348, 20 L.Ed. at 650.

Moreover, in this Court's landmark decision in *Pierson v. Ray,* 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967), this Court reiterated and reaffirmed its recognition of the importance of the doctrine of judicial immunity. This Court stated:

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on

judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray*, 386 U.S. at 554, 18 L.Ed.2d at 294-295.

Furthermore, this Court recently reaffirmed its recognition of the importance of judicial immunity in *Stump v. Sparkman*, 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978). Simply stated, this Court has consistently upheld the doctrine of judicial immunity and has given it effect in the cases involving the issue.

Numerous Circuit Courts of Appeals recognize the importance and applicability of the doctrine of judicial immunity. These Circuit Courts of Appeals emphasize that judges are absolutely immune to civil damage suits for judicial acts done within their jurisdiction. These courts recognize that no immunity doctrine is more strongly established than that of judicial immunity. *Waits v. McGowan*, 516 F.2d 203 (3rd Cir. 1975); *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973); *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970); *Perez v. Borchers*, 567 F.2d 285 (5th Cir. 1978) cert. den. 99 S.Ct. 109; *Kurz v. State of Michigan*, 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U. S. reh. den. 98 S.Ct. 1289; *Brown v. Dunne*, 400 F.2d 341 (7th Cir. 1969); *Hansen v. Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965); *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967). The Ninth Circuit Court of Appeals in *Gregory v. Thompson, supra*, appropriately described the judicial system's consistent recognition of the doctrine of judicial immunity when it said that the doctrine is "a seemingly impregnable fortress

in American jurisprudence. . . ." *Gregory v. Thompson*, 500 F.2d at 62.

Consequently, the recognition of the applicability of the doctrine of judicial immunity in the instant case by the Fifth Circuit Court of Appeals is consistent with the decisions of this Court and numerous other Circuit Courts of Appeals. It appears that the doctrine of judicial immunity is essential for the proper administration of justice and the consistent adherence to such a principle bears out its importance.

II.

IT IS A WELL ESTABLISHED LEGAL PRINCIPLE THAT THE DOCTRINE OF JUDICIAL IMMUNITY APPLIES EVEN WHEN A JUDGE IS ACCUSED OF BEING CORRUPT OR MALICIOUS.

Petitioners assert that the federal courts, including this Supreme Court, in propounding the doctrine of judicial immunity, have used broad language, and that any inclusion of a judge within the scope of judicial immunity when the judge was motivated by malice and corruption is merely dicta. Petitioners fail to substantiate their allegation with any authorities.

Contrary to Petitioners' unsubstantiated opinion, the scope of judicial immunity is intended to encompass judicial acts motivated by malice and corruption. In *Bradley v. Fisher, supra*, this Court explicitly stated that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall. at 351, 20 L.Ed. at 651.

In *Pierson v. Ray, supra,* this Court again explained that judicial immunity applies even if a judge is accused of acting corruptly. This Court said that:

> "This immunity applies even where the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. at 554, 18 L. Ed.2d at 294.

Moreover, in *Stump v. Sparkman, supra,* this Court clearly explained that a judge will not be deprived of immunity because the action he took was done maliciously. In discussing the inclusion of malice and corruption within the scope of judicial immunity, this Court stated in *Stump v. Sparkman* that:

> "Even earlier, in *Randall v. Brigham,* 7 Wall 523, 19 L.Ed. 285 (1869), the Court stated that judges are not responsible 'to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly.' Id. at 537, 19 L.Ed. 285. In *Bradley* the Court reconsidered that earlier statement and concluded that 'the qualifying words used were not necessary to a correct statement of law. . . .' *Bradley v. Fisher,* 13 Wall 335, 351, 20 L.Ed. 646 (1872)." 55 L.Ed.2d at 338.

Simply stated, this Court has expressly stated that judicial immunity applies even when a judge has been accused of being corrupt or malicious. The Court has indicated that it is not dicta by specifically addressing the issue within several cases which have been before it.

III.

IT IS UNCONTROVERTED THAT THE JUDGE IN THE PRESENT CASE ACTED WITHIN HIS STATE COURT JURISDICTION.

It is uncontroverted that Judge Carrillo acted within his state court jurisdiction. A distinction should be made here between an act "in excess of jurisdiction" and an act "in clear absence of all jurisdiction."

Judges are immune from suit for judicial acts done within or "in excess of" their jurisdiction, even if those acts have been done maliciously or corruptly. *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974); *Lucarell v. McNair,* 453 F.2d 836, 838 (6th Cir. 1972); *Lynch v. Johnson,* 420 F.2d 818, 820 (6th Cir. 1970); *Agnew v. Moody,* 330 F.2d 868, 870 (9th Cir.), cert. denied, 379 U.S. 867 (1964).

It is only those instances in which a judge acts in the ". . . clear absence of all jurisdiction over the subject matter that he may be sued for damages." *Williams v. Sepe,* 487 F.2d 913 (5th Cir. 1973). *Jacobson v. Schaefer,* 441 F.2d 127 (7th Cir. 1971).

Consequently, an important element in the concept of jurisdiction as used in the context of judicial immunity necessitates an inquiry into the act or acts of which Petitioners complain. In their First Amended Complaint, they assert that "the recovery of 13,000 barrels of crude oil

was lost as a result of the temporary injunction, since other operators producing oil from the same reservoir were not similarly enjoined." It is clear that Petitioners' complaints are directed toward the order signed by Judge Carrillo, temporarily enjoining production of oil from land leased in Duval County. Even if erroneous, Carrillo's act in entering this judgment was a judicial act. The order could not have been entered in any other capacity other than in Carrillo's judicial capacity.

In *Winslow v. Duval County Ranch Company,* 519 S.W.2d 217 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), the Texas appellate court, in reviewing Carrillo's actions in granting the temporary injunction, held that he "abused his discretion". 519 S.W.2d at 224. The Texas Court did not hold that Carrillo was without jurisdiction.

In order to exercise discretion, a judge would have to have jurisdiction over the parties and subject matter and be able to enter the order which he did. Therefore, Carrillo's act in entering the order granting the temporary injunction was not "in absence of all jurisdiction."

Importantly, this court should note that without such order or act (the injunction) Petitioners would not have sustained the "alleged" injury nor would there be anything of which to complain. Therefore, the injurious act complained of was a judicial act, clearly done in Judge Carrillo's judicial capacity and within the Judge's jurisdiction. His subject conduct thereby falls within the scope of judicial immunity.

IV.

THERE IS NO SUPPORT IN THE RECORD FOR PETITIONERS' ARGUMENT THAT THE STATE COURT JUDGE WAS DISQUALIFIED IN THE SUBJECT STATE COURT CASE. THE ARGUMENT IS PREMISED IN STATE LAW AND BASED UPON ANOTHER LAWSUIT UNRELATED TO THE SUBJECT LAWSUIT—ANOTHER LAWSUIT INVOLVING OTHER PARTIES, ISSUES AND SUBJECT MATTER. MOREOVER, THE ARGUMENT RUNS CONTRARY TO WELL-SETTLED TEXAS LAW.

In the first "question" stated on page 2 of their Petition, Petitioners include two unsupported assumptions. First, they assume that Judge Carrillo was adjudged disqualified to sit in the subject state court case. Second, they assume that what they call a "bribe" had a direct effect in the present case.

The only attempt by Petitioners to actually justify such assumptions was a reference to a wholly distinguishable state court case involving only some but not all of the same parties in this case. "Manges v. Guerra, et al", No. 3953, 229th District Court of Starr County. That case involved different parties, facts and legal issues and did not deal with the issue of Carrillo's disqualification to hear the case in which he entered the subject temporary injunction, which was styled "Duval County Ranch Company vs. Winslow, et al".

Any judgment in the state court case of "Manges v. Guerra, et al" is not *res judicata* as to this Respondent and the other parties in the instant case. Black's Law

Dictionary, 4th Ed. Rev. 1968 defines *res judicata* as the rule that:

> "final judgment or decree on merits by court of competent jurisdiction is conclusion of rights of parties of their privies in all later suits on points and matters determined in former suits. And to be applicable, requires identity in thing sued for as well as identity of cause of action, of persons and parties to action and of quality in persons for or against whom claim is made."

The case of "Manges v. Guerra" involved different parties, different rights, different facts, different legal issues and an altogether different cause of action. The Petitioners were not even parties to the "Manges v. Guerra" action. Simply stated, the reliance of Petitioners upon the unreported trial court order in "Manges v. Guerra" for disqualification of the judge in the state court case involved in the present case is faulty for the above stated reasons. Furthermore, Petitioners have misstated the order entered in that case.

Another state district judge, the Honorable Magus F. Smith, entered an order ruling only that Carrillo was disqualified to sit as judge in that particular styled and numbered cause. The judge did not order, as Petitioners have inaccurately stated, that Judge Carrillo was disqualified to sit in any case in which Manges was a party or was interested. That order appears in the Petition for Writ at pages 65a-66a.

There is no showing in the record before the Court that Judge Carrillo was disqualified from sitting in the subject injunctive suit. In fact, no such challenge was made by the Petitioners in the subject state court injunction suit. The issue was never raised. But they try to raise it now in this federal court litigation.

Outside of relying on distinguishable factual and legal occurrences, Petitioners have failed to meet their burden of proof in regard to justifying why Carrillo should have been disqualified in the subject state court suit. Moreover, their argument is premised on grounds which are contrary to well-settled Texas law.

Petitioners rely upon their reading of the Texas Constitution, Article 5, Section 11, which provision appears in the Petition at pages 45a-46a. Petitioners' basic argument is that the acceptance of a "bribe" should disqualify a judge. Under Texas law, there are certain criteria which must be proved and established before disqualification exists.

Article 5, Section 11, of the Texas Constitution stated that a judge may be disqualified if he is "interested" in the case, or where either of the parties may be connected with him, either by affinity or consanguinity or where a judge shall have been counsel in the case. That provision is both inclusive and exclusive. It specifies all the circumstances that forbid a judge to sit. See 33 Tex. Jur. 2d "Judges", Sec. 27 (1962) and cases there cited.

Petitioners fail to state which ground they are relying on for disqualification. Consequently, because there is no allegation that Carrillo was a previous counsel in the case or that the parties were connected by affinity or consanguinity, we will assume that Petitioners rely upon the "interest" factor for disqualification.

Texas law indicates that there is no compulsion to step aside when a judge is not legally disqualified. Unless

legally disqualified, it is the duty of the judge to preside. *Maxey v. Citizens National Bank of Lubbock*, 489 S.W. 2d 697 (Tex. Civ. App.—Amarillo, 1972), rev'd on other grounds, 507 S.W.2d 722 (1974).

It has long been established that the "interest" required for disqualification is one of a pecuniary nature. The possibility of pecuniary gain to the judge must arise directly out of the result of the suit, but not remotely. *Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. Sup. 1979); *Moody v. City of University Park*, 278 S.W.2d 912 (Tex. Civ. App.—Dallas 1955 ref'd n.r.e.); *Ex Parte Largent*, 162 S.W.2d 419 (Tex. Civ. App. 1942).

To prove disqualification, Petitioners have the burden of showing that Carrillo had a direct pecuniary interest in the result of the case, and not some interest that may occur or which is very remote. The only "proof" Petitioners provide is an allegation that Manges had made some gifts to Carrillo in the years prior to the subject state court lawsuit. However, Petitioners do not show a direct pecuniary interest in the case on behalf of Carrillo.

Simply stated, Petitioners have failed to meet their burden of proving disqualification.

V.

PETITIONERS FAIL TO CORRELATE HOW ANY ALLEGED BRIBERY AFFECTED THE JUDGE'S DECISION IN THE PRESENT CASE.

Petitioners state that bribery is an impeachable offense. However, Petitioners fail to specifically correlate how any

alleged bribery affected the Judge's decision in the present case. Petitioners fail to show how alleged bribery created any direct, real and certain interest on behalf of Carrillo in the subject matter of this case.

The Petitioners present an argument in their Petition more compelling than the facts support. Petitioners complain vociferously about the state court judge, Carrillo, entering the injunction because of a "bribe" from Manges. That assertion certainly sounds bad. But just what was the "bribe"? One must re-read the Petitioners' First Amended Complaint filed in the District Court to find a description of the so-called "bribe".

With reference to "Plaintiffs' First Amended Complaint", which appears in the Petition, beginning at page 47a, we refer specifically to Paragraph 6 of the amended complaint, appearing at pages 50a-51a of the Petition. What was the alleged "bribe" that caused Judge Carrillo to enter the injunction? As described in said portion of the amended complaint, the "bribe" consisted of Manges' support of Carrillo in his campaign for election as state district court judge. After Carrillo's election, the "bribe" consisted of several alleged gifts made by Manges to Carrillo over a period of three or four years.

The alleged post-election gifts consisted of Manges' issuance to Carrillo of enough bank stock to qualify Carrillo for his election to the Board of Directors of the First State Bank & Trust Company of Rio Grande City, Texas. The "bribe" included Carrillo's eligibility for a director's fee of $50.00 per month. Further, the "bribe" included Manges' causing Carrillo's brother, Ramiro Carrillo, to be elected to the Board of Directors of the same bank.

Carrillo was elected Judge of the 229th District Court of Duval County, Texas, in November of 1970. It is alleged that Carrillo became a director on or about December 10, 1970. It is alleged that his brother, Ramiro Carrillo, became a director prior to December 31, 1972.

The "bribe" includes the alleged gift from Manges to Judge Carrillo of a new automobile on January 27, 1971. Further, during 1971, Manges is alleged to have allowed Judge Carrillo to graze Carrillo's cattle on land owned by Manges without charge. In addition, during the same year, it is alleged that Manges and Carrillo entered into an oral grazing lease for a term of three years, which included no down payment, allowed Manges to cancel at any time, and called for payment at the end of the term either in cattle or money.

Furthermore, during the years of 1971 through 1973, the alleged "bribe" consisted of a bank loan from that bank to Carrillo for over $300,000.00, which loan was secured by Carrillo's real estate. The "bribe" consisted of other unsecured loans in the same bank totalling over $38,000.00.

So it does appear that the alleged "bribe" is really not one act, such as Manges handing money or other property to Judge Carrillo in connection with the subject state court lawsuit. Instead, the "bribe" which the Petitioners describe is an alleged continuing business relationship between Manges and Carrillo.

The foregoing clarification of the component parts of the alleged "bribe" is important here because of the Petitioners' allegation that acceptance of the "bribe" made Judge Carrillo disqualified from participating in the subject state court lawsuit under Texas law.

The argument sounds good, but it does not withstand scrutiny. Judge Carrillo would not be held to have been disqualified to enter the subject injunction if the issue had ever been litigated in a Texas court. As indicated previously, Article 5, Section 11, of the Texas Constitution has been interpreted by Texas courts to mean that a judge shall be disqualified in a particular case if he has a pecuniary interest in the outcome of the case, or if he is connected to the parties by affinity or consanguinity, or if he has been counsel in the case. Texas law indicates, however, that there is no compulsion to step aside where a judge is not disqualified by the above criteria. In fact, there is a compulsion to preside in the case.

Despite their conclusory allegations, Petitioners have not alleged facts which show that Carrillo entered the injunction in consideration for a "bribe". Quite clearly the "order" entered in the trial court in the "Guerra" suit did not retroactively disqualify Carrillo in the subject state court injunction suit.

VI.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE STRICKEN FOR THE REASON THAT PETITIONERS FILED THEIR PETITION TOO LATE.

The Petition for Writ of Certiorari should be refused because Petitioners appear to have filed it too late. The Petition complaining of Carrillo's immunity from suit perhaps should have been filed following the Fifth Circuit Court of Appeals' decision on January 17, 1979.

Rule 22(3) and Title 28, U.S.C., Section 2101 prescribe the time requirements for filing with the Supreme Court a petition for writ of certiorari to review judgments of lower federal courts. Title 28, U.S.C., Section 2101(c) states, "any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." In the present case, the Fifth Circuit Court of Appeals first entered judgment on the case in January 17, 1979. No petition for writ of certiorari was filed by Petitioners within ninety (90) days after such judgment, and no motion for extension of time was filed.

Did the grant of the rehearing en banc by the Court of Appeals, on its own motion, suspend the time for Petitioners' filing? We think not. The rehearing was granted to reconsider the holding regarding the derivative immunity of the private citizen co-conspirators. It was not granted to reconsider the issue of the judge's immunity.

The Fifth Circuit Court of Appeals specifically stated in its en banc decision that, "we consider this case en banc to review the holding of our panel that private citizens, in conspiring with a state judge, did not conspire with any person against whom a claim valid under 42 U.S.C. Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under the statute." *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976 (5th Cir. 1979). As for the issue of the state court judge's immunity, the Fifth Circuit reiterated that Carrillo was unqualifiedly immune from suit, as so held in the opinion rendered by the panel on January

17, 1979. 604 F.2d at 978. Consequently, the issues referred to in the Petition for Writ of Certiorari were not considered by the Fifth Circuit Court of Appeals on its reconsideration en banc.

However, if the effect of the reconsideration en banc by the Fifth Circuit Court of Appeals was to suspend the time for Petitioners' filing the subject petition, some authorities have indicated that where there is a second judgment a petition for writ of certiorari is timely if it was filed within ninety (90) days after the second judgment was entered. *Reece v. Georgia,* 350 U.S. 85, 100 L.Ed. 77, 76 S.Ct. 167 reh. den. 550 U.S. 943, 100 L.Ed. 822, 76 S.Ct. 297 (1955).

However, this Petition for Writ of Certiorari is still not timely because it was not filed within ninety (90) days after the en banc decision of October 22, 1979. Instead, it was filed on February 1, 1980. No petition for rehearing was filed by Petitioners with the court of appeals, which may have extended the time for filing the Petition.

The only petition for rehearing filed after entry of the judgment on October 22, 1979, was filed by this Respondent to complain about the holding on derivative immunity which is not involved in Petitioners' Petition for Writ. Respondent has not found any authority which permits the appellant in the court of appeals to rely on a petition for rehearing filed by the appellee to extend the time for filing the appellant's petition for rehearing. Moreover, no motion for extension of time was filed by Petitioners on or before the deadline, January 21, 1980. Consequently, the Petition for Writ of Certiorari is not timely and should be withdrawn.

SUMMARY

None of the challenges raised by Petitioners justify the exercise of this Court's writ jurisdiction. Petitioners do not justify the arguments they have developed.

This Court and numerous Circuit Courts of Appeals have upheld the doctrine of judicial immunity as was done in the en banc and panel decisions of the Fifth Circuit Court of Appeals in this case. This doctrine has been consistently held to apply even when a judge is accused of being corrupt or malicious. In the subject case the judge was within his state court jurisdiction in regard to the actions he took.

As to Petitioners' argument regarding disqualification of a judge, Petitioners fail to meet their burden of justifying such disqualification. They rest their hopes on an order entered in another case which involved different parties, facts and issues. Moreover, Petitioners have failed to timely file their Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, Respondent Orville Dennis respectfully submits that the Petition on behalf of Petitioners Sidney A. Sparks and R. L. Lynd d/b/a Sid-

ney A. Sparks, Trustee, for Writ of Certiorari, should be refused.

Respectfully submitted,

ORVILLE DENNIS, *Respondent*

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondent Orville Dennis in opposition to Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following parties, or where represented by counsel, to the counsel of record in the court below: Mr. Garland Smith, P. O. Drawer 1104, Weslaco, Texas 78596; Mr. Clarence Martens, #5 Northwood, Del Mar Hills, Laredo, Texas; Mr. Raul Garcia, 208 N. Cameron, Alice, Texas 78332; and Hon. Mark White, Attorney General, P. O. Box 12548, Austin, Texas 78711, Attn: Ms. Laura Martin, Asst. Attorney General; on the _____ day of March, 1980.

FINLEY L. EDMONDS
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APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 77-1249

SIDNEY A. SPARKS, R. L. LYND, d/b/a
SIDNEY A. SPARKS, TRUSTEE,
Plaintiffs-Appellants,

versus

DUVAL COUNTY RANCH COMPANY,
INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

ON PETITION FOR REHEARING

(December 14, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

* Judges Frank M. Johnson, Jr., Garza, Henderson, Reavley, Politz, Hatchett, Anderson, Randall, Sam D. Johnson, and Tate did not participate in the consideration of or decision in this case. The case was taken under submission by the Court en banc on June 5, 1979.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Orville E. Dennis in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

THOMAS GIBBS GEE
United States Circuit Judge